

# ASIA AND THE ICC: THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW IN A WORLD CHANGING ORDER

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**Summary:** Although Asia houses over 50 percent of world’s population, it is underrepresented in the ICC. This underrepresentation is due to rationales both legal and political in nature. While the Asian nations do lack enthusiasm towards ratifying the Rome Statute, there could be tangible benefits to becoming a part of the ICC. This could help in the ongoing development of international law in Asia as well as greater recognition of human rights, international justice and accountability, thus, further emphasizing the importance of the rule of law in the continent. The benefits of ratifying the Rome Statute outweigh any disadvantages, real or perceived, and thus, domestic steps need to be undertaken to lead to eventual ratification. This paper will trace the histories of International Criminal Law and analyse the Asian participation in its discourse while further exploring the reasons for the disinclination of the Asian nations to join the ICC.

**Keywords:** International Criminal Court, International Criminal Law, Asia, Rome Statute, Ambivalence.

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## 1 Introduction

The European commitment to International Criminal Law is evident from the ratification by all EU Member States to the Rome Statute by 2002 itself.<sup>1</sup> The

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1 GROENLEER, Martijn. The United States, the European Union, and the International Criminal Court: Similar Values, Different Interests? *International Journal of Constitutional Law*, 2015, vol. 13, pp. 923–928.

EU has encouraged the Asian nations to ratify and implement the Rome Statute in several Asia-Europe Meetings. Their attempts to encourage the ratification has contributed in increasing the number of nations who are now member states of the ICC, including a few Asian nations such as Japan and Maldives,<sup>2</sup> though the latter nation has backtracked on its accession to the Rome Statute.<sup>3</sup>

The Asian nations have not shown much interest in the ICC since its adoption.<sup>4</sup> The role of dominant nations such as the USA, China, Russia, India etc. also refusing to ratify the Rome Statute calls into question their influential capacity on the smaller Asian nations who have uncertainty regarding the ratification and future impacts of their ratification on the international law and international affairs.<sup>5</sup>

The past few decades has seen several tribunals being established: the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), the ad hoc International Criminal Tribunal for Rwanda (ICTR), and the ICC. However, with the establishment of several tribunals there is also a North-South divide and hypocrisy seen with an unlikelihood of individuals of Western developed nations being tried in the tribunals.<sup>6</sup> Instead, until now these tribunals have been seen as a tool to threaten leaders of developing nations and oppose the ideological views of hegemonic states.<sup>7</sup>

It is seen that the International Criminal Tribunals are used as a medium to pressurize third world nations to succumb to hegemony and dominion of certain states under the disguise of ensuring justice for international crimes. The modern criminal law order further perpetuates global capitalism as it does not pay any heed to international causes of internal conflicts in third world nations, which ultimately indicates the violence that is never spoken of.<sup>8</sup>

Asia has had a fear of westernization with international criminal justice as the nations had finally found their autonomy and democracy after a long fought

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2 *The European Union's Reply to the Information Request in paragraph 6, sub-paragraph h) of the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute*, European Union, 7 July 2014. para. 2.1. at 4.

3 *Malaysia Backtracks on Accession to the Rome Statute*. [online]. Available at: <<https://www.coalitionfortheicc.org/news/20190412/malaysia-backtracks-accession-rome-statute.>> Accessed: 24.01.2022

4 TOON, Valeriane. International Criminal Court: Reservations of Non-State Parties in Southeast Asia. *Contemporary Southeast Asia*, 2004, vol. 26, pp. 218.

5 FINDLAY, Mark. Sign Up or Sign Off – Asia's Reluctant Engagement with the International Criminal Court, *Cambodia Law & Policy Journal*, 2014, vol. 1, pp. 75.

6 CHIMNI, BS. International Institutions Today: An Imperial Global State in the Making. *European Journal of International Law*, 2004, vol. 15, no. 1, pp. 13.

7 *Ibid.*

8 *Ibid.*

colonial history only to return to a notion of westernized justice which would again build another form of neo-colonial representation.<sup>9</sup>

Asia has had the lowest acceptance of jurisdiction of international courts.<sup>10</sup> It also does not have any regional framework similar to the African Union (AU), the Organization of American States (OAS), or the EU. As a group of 53 nations, Asia has sparingly adopted a common position on matters; but sub-regional groupings continue to have narrowly shared national interests.<sup>11</sup> Further, other regional groupings have at least come up with a “common position” or an “integrated policy” on ICC, but not Asia.<sup>12</sup> This is due to the diversity of the continent and the dominant Asian nations with their own power interests.<sup>13</sup>

## 2 Asian States and Engagement With ICC

Most of the Asian nations were not part of the negotiation process for most of the instruments that define the modern international order.<sup>14</sup> As of April 2019, 123 countries have become parties to the Rome Statute of the International Criminal Court (Rome Statute). 19 of those 123 countries are from the Asia-Pacific States.<sup>15</sup> Most of the Asian nations that are part of the ICC had ratified the Rome Statute as early as in 2000–2002 (10 of the 19 states) and do not seem to have participated in the discussions at all.

The idea of a criminal court at a global level originated as early as in nineteenth century. However, crimes committed during Franco-Prussian War in 1872, trial of Kaiser and German World War I criminals as well as Nuremberg and Tokyo tribunals for the trial of Axis war criminals invited a world-wide call for an internationalized system of justice. Gustav Moynier, one of the founders of the International Committee of the Red Cross and drafters of the 1919 Treaty

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9 FINDLAY, Mark. *supra* note 5.

10 CHESTERMAN, Simon. Asia's Ambivalence about International Law and Institutions: Past, Present and Futures. *European Journal of International Law*, 2016, vol. 27, pp. 945–946.

11 *Ibid.*

12 TOON, Valeriane. *supra* note 4.

13 CHESTERMAN, Simon. *supra* note 10.

14 China, Iran, Japan and Thailand were the only four Asian countries to represent at The Hague Peace Conferences of 1899 and 1907 out of 26 and 43 participants respectively. The only 4 Asian original members to sign the Covenant of the League of Nations in 1919 were China, Saudi Arabia, Japan and Thailand. Further, China, India, Iran, Iraq and the Philippine Commonwealth were the only five Asian signatories out of 44 at the Bretton Woods Conference in 1944, through which the World Bank and the International Monetary Fund was established. UN also witnessed only eight Asian original members (China, India, Iran, Iraq, Lebanon, Philippine Commonwealth, Saudi Arabia and Syria) out of 51.

BROHI, A. K. Five Lectures on Asia and the United Nations. *Collected Courses of the Hague Academy of International Law*, 1961, pp. 121–128.

15 ICC Assembly of State Parties-State Parties to the Rome Statute-Asia-Pacific States. [online]. Available at: <[https://asp.icc-cpi.int/en\\_menus/asp/states parties/asian states/Pages/asian states.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx)> Accessed: 24.01.2022

of Versailles strongly voiced their opinions in favour of such system. The United Nations General Assembly (UNGA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 to try criminals by international tribunals.<sup>16</sup>

The pressure of all these events led the UNGA to invite the International Law Commission (ILC) to help in the establishment of a court at the international level.<sup>17</sup> While an initial statute was drafted in the 1950s, the Cold War hampered the momentum and the process. In early 1990s, mass commission of crimes against humanity, war crimes, and genocide committed in Bosnia-Herzegovina, Croatia, and Rwanda led to ad hoc tribunals being established, which then also called to attention the requirement of a permanent international criminal court.<sup>18</sup> Trinidad and Tobago had also proposed establishing an international criminal court to combat drug trafficking.<sup>19</sup>

In 1994, a final draft statute was presented by the ILC.<sup>20</sup> To negotiate over substantive issues in the draft, an Ad Hoc Committee on the Establishment of an International Criminal Court was established to meet and discuss the draft in 1995.<sup>21</sup> Thereafter, the Preparatory Committee facilitated negotiation processes over six sessions from 1996 to 1998.<sup>22</sup> The entire process witnessed active participation from European countries with an apparent lack of Asian voices especially of the developing nations. After conducting Inter-Sessional meetings to consolidate views and present the draft, the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court was organized in 1998 in Rome with the goal of finalizing and adopting the draft and establishing an international criminal court. A total of 160 nations were a part during the conference, along with several Non-Governmental Organization (NGO) Coalition which facilitated participation of over 200 NGOs.<sup>23</sup> With over three years of negotiations, there was a vote of 120 nations voting in favour of the adoption of the Rome Statute, seven nations voting against the adoption, and 21 nations abstaining from voting.<sup>24</sup>

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16 *ICC History – The Road to Rome*. [online]. Available at: <https://www.coalitionfortheicc.org/icc-history> Accessed: 24.01.2022

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 General Assembly: GA Res. 5046 (L), fiftieth session, Official Records, Supplement 49 at 307, UN Doc A/50639 (1995). An Ad Hoc Committee was established to review ILC's final draft by way of the resolution.

22 General Assembly: GA Res. 5216 (LII), fifty-second session, Official Records, Supplement 49 at 384, UN Doc A/5249 (1997). In 1995, the Preparatory Committee was established after consideration of final report of the ad hoc committee to draft a "*widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference of plenipotentiaries.*"

23 *supra* note 16.

24 *Ibid.*

The debates not only show the Asian voices through the lenses of the well-off nations of Japan, China and South Korea, but on a deeper level it exposes the inability of the other nations to voice their opinions during the debates. The conception of “Asian participation” has been limited to nations that had the resources to focus on economic development as well as social, political and human rights development, while the “developing” Asian nations were left to prioritise on economic development and not consider the debates on International Criminal Law of much importance.

## 2.1 The Preparatory Committee

The Preparatory Committee on the Establishment of an International Criminal Court (hereinafter referred to as the Preparatory Committee) saw elected Chairman and Vice-Chairmen from the different continents except for Asia. The Asian representation was merely as the Committee Rapporteur.<sup>25</sup>

The First meeting of the first session hardly saw any Asian participation with China, Israel, Russia and Australia being the only Asian nations.<sup>26</sup> Furthermore, from the material related to the Preparatory Committee, it was observed that there were no informal meetings conducted by Asian nations.<sup>27</sup>

During the Third Session, Singapore was the only Asian country with important points to be introduced to help focus discussions on penalties and the defenses.<sup>28</sup> Nations from the other continents had taken an active role while not much was seen from Asia.<sup>29</sup>

The Fifth Session saw discussions on the establishment of the ICC and its relationship with the UN, composition and administration of the ICC, final clauses, all matters that had not yet been considered, and subjects left over from previous sessions, including procedural matters and the draft rules for the conference.<sup>30</sup> There was a lack of representation of Asian nations in these positions which clearly reflects that these countries did not have much voice in the functioning of the entire process.

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25 *Preparatory Committee On Establishment Of International Criminal Court Begins First Session*. [online]. Available at: <<https://www.un.org/press/en/1996/19960325.12761.html>> Accessed:24.01.2022.

26 *Ibid*.

27 BENEDETTI, Fanny. Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference. *Global Governance*, 1999, vol. 5, no. 1, pp. 6.

28 HALL, Christopher, The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, *American Journal of International Law*, 1998, vol. 92, pp. 130;

29 *Ibid*.

30 HALL, Christopher. The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court. *American Journal of International Law*, 1998, vol. 92, pp. 338–339.

The informal-informais meetings, comprised of voluntary small group of delegates being headed by many delegations and sub-issue coordinators, were mostly conducted during the fifth and sixth session of the Preparatory Committee. Most of these drafting and informal meetings were conducted untimely and beyond the assigned schedule, either early in the morning or too late in the night. It caused inordinate confusion and chaos to the delegates of developing and small nations and civil society members as they were seen cluelessly walking through the corridors unable to comprehend the constantly changing schedule of the meetings.<sup>31</sup>

While India and China did participate at Rome, they found themselves to be part of a minority and outside the like-minded group that came to dominate.<sup>32</sup> Over the years, after the establishment of the ICC, both India and China have raised issues and reservations during meetings,<sup>33</sup> including the Special Working Group on the Crime of Aggression,<sup>34</sup> the Kampala Review Conference,<sup>35</sup> and Assembly of States Parties.<sup>36</sup>

## 2.2 Big Nations Vs Small Nations: A Compromise?

It cannot be less emphasized that it is important for a nation or a group to engage in discussions to secure and protect its own interests. The meetings were not democratic as it was more of a compromise trying to accommodate the bigger countries.<sup>37</sup>

The focus was not on universal representation but timely completion of the Rome Statute. Several delegations lacked the capacity and expertise which was considered a major obstacle in the progress of the working groups. Therefore, there were 'limited members drafting groups' formed which saw to the creation of an "acceptable" text.<sup>38</sup>

There were many discussions based on issues such as jurisdiction or types of crimes covered. Many delegations lobbied for more crimes to be covered by the Rome Statute, apart from the three that were seen in the original accepted

31 BENEDETTI, Fanny. *supra* note 27.

32 BASSIOUNI, Cherif; SCHABAS, William. *The Legislative History of the International Criminal Court. Second Edition.* Brill, 2016.

33 LINTON, Suzannah. India and China Before, At, and After Rome. *Journal of International Criminal Justice*, 2018, vol. 16, pp. 275.

34 The attendance of China and India is noted in: Assembly of States Parties, Report of Sixth Session, Doc. ICC-ASP/6/SWGCA/INF.1, 30 November – 14 December 2007; Assembly of State Parties, Report of the Eighth Session, Doc. ICC-ASP/8/INF.2, 18–26 November 2009.

35 Review Conference of the Rome Statute of the International Criminal Court, Official Records, Kampala, 31 May–11 June 2010, at 3.

36 *Statement by Ms. Guo Xiaomei (China)*. [online]. Available at: <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf)> Accessed:24.01.2022

37 BENEDETTI, Fanny. *supra* note 27.

38 *Ibid.*

text: war crimes, crimes against humanity, and genocide. The nations could not reach a solution in spite of extensive debates and deliberations due to lack of consensus. Many proposals were tabled relating to jurisdictional issues, including a Korean proposal which was vehemently argued against.<sup>39</sup> The bureau had therefore given a deadline to come up with a suitable solution otherwise it would be considered later through a protocol or a review conference.<sup>40</sup> Many delegations were not happy with the bureau's decision and did not welcome an arbitrary deadline.<sup>41</sup> Such events further reflect that the focus was on completion of the Rome Statute, rather than consideration of diverse interests especially of small and developing nations.

The information provided regarding the discussions indicate a dearth of Asian proposals, discussions, submission of papers, and chairing working groups. Five major working groups that handled core issues like definition of crimes, general principles of criminal law, penalties, procedural matters, and state cooperation were chaired by representatives from Netherlands, Sweden, Norway, Argentina, and South Africa respectively.<sup>42</sup> There was no representative from Asian nation heading these groups. From these accounts, it is apparent that very few Asian nations engaged in the discussions on prominent issues throughout the negotiation process.

Further, language barriers, small delegations and delegations with less/no authority to negotiate were other issues that prevented small and developing nations from engaging in fruitful discussions. It was also observed that many informal discussions and meetings were restricted to the chairs and coordinators of groups and other active members, thus leaving out small and developing nations.<sup>43</sup>

The lack of equipment, including projectors and monitors, coupled with the long amendments, and verbose language were spoken out to the members by the proposers. As such, this technological deficiency led to the members of the Preparatory Committee not being able to cope up with the long texts read out hurriedly and the sequence and cross-references of provisions. Not only did this complicate the matter for the members but it also proved to lead to controversy.

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39 KIRSCH, Philippe. The Rome Conference on an International Criminal Court: The Negotiating Process. *American Journal of International Law*, 1999, vol. 93, no. 2, pp. 6–9.

40 Bureau Proposal, UN Doc. A/CONF.183/C.1/L.59, 1998.

41 KIRSCH, Philippe. *supra* note 39.

42 HALL, Christopher. *supra* note 30.

43 BENEDETTI, Fanny. Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference. *Global Governance*, 1999, vol. 5, no. 1; BASSIOUNI, Cherif. Negotiating the Treaty of Rome on the Establishment of an International Criminal Court. *Cornell International Law Journal*, 1999, vol. 32, pp. 443; HALL, Christopher. *supra* note 28; HALL, Christopher. *supra* note 30; HALL, Christopher. The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court. *American Journal of International Law*, 1998, vol. 92, pp. 548.

An instance of this controversy lies in the final meetings of the every Preparatory Committee session where the delegations are required to give their approval and final changes, additions, and reservations. This part of the meeting was usually hurriedly completed due to the numerous texts that needed to be heard and dealt with. This proved to be a challenge for delegations who were working in languages other than English due to the rapid speed at which the text was read out. These delegations that were not proficient or very comfortable with the use of English had a tough time regarding the non-transparency of Preparatory Committee proceedings.<sup>44</sup> There was also an added bias due to the proceedings being conducted solely in the English language, without the use of any interpretation, to any other language.<sup>45</sup>

Most delegations came through foreign ministries, but larger countries, first world countries, consisted of representatives from several ministries, including the Ministry of Justice as well as the Ministry of Defense. Such delegations also consisted of individuals with exposure and experience in domestic criminal law, as a judicial personnel, through the civil service, or as advocates practicing in the area of criminal law.<sup>46</sup> However, numerous delegations were small in size and also silent throughout the sessions, lacking exposure or experience to the issues being dealt with and hence not being able to mount a presence and speak up.<sup>47</sup> This proved to be a challenge to the Preparatory Committee sessions.

Delegations from the larger and first world countries had specific and detailed instructions, while most developing countries did not have such specificity or detail and their instructions were fairly vague.<sup>48</sup> With well-equipped and better information the larger countries took over the sessions allowing them to conduct efficient negotiations with discretionary authority.<sup>49</sup> The smaller, developing nations with vague instructions and limited knowledge could not keep up with the negotiations and ultimately became timid in the discussions.<sup>50</sup>

### 2.3 Euro-Centrism Redefined

At the heart of international criminal law, its legitimacy has been derived from the vast majority of laws written in Europe, with the trials and academic writing focusing on Eurocentricity. Such Eurocentricity was evident from the Tokyo Trials and to such an extent portray the history of international criminal

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44 BENEDETTI, Fanny. *supra* note 27.

45 BASSIOUNI, Cherif. *supra* note 32.

46 BENEDETTI, Fanny. *supra* note 27.

47 *Ibid.*

48 BASSIOUNI, Cherif. *supra* note 32.

49 *Ibid.*

50 *Ibid.* Some delegations were undoubtedly at special positions. For instance, Italy and Netherlands were going to be the host country for Rome Conference and International Criminal Court respectively.



law in the Asian region as effacing colonialism and racism, as they are incomplete.<sup>51</sup>

While Europe has remained the sovereign and theoretical subject of all histories,<sup>52</sup> modern international law has been constructed around the imperial project<sup>53</sup> and the exclusion of the Oriental and other colonized nations being justified by reference to culture, religion and biology.<sup>54</sup> The dominant course of the European project was to exclude the 'other', and then try to 'civilize' them intending to make the other more like the self.<sup>55</sup> This European history has seeped into the international criminal justice discourse with the Western nations having a greater influence, if not all, on the formation of the Rome Statute and the ICC.

### 3 Rationales Provided By Specific Govts

#### 3.1 China

The Chinese government provides five prongs for its non-ratification of the Rome Statute.

First, imposition of ICC jurisdiction upon non-state parties without its acceptance violates the principle of voluntary acceptance, national sovereignty and the Vienna Convention on the Law of Treaties. In addition, the principle of complementarity through which ICC decides whether a state is capable to bring legal action against its nationals is seen to be problematic. In furtherance of the complementarity principle, the members of international society must support the developing nations because nations having difficulties with their domestic criminal systems will not be able to investigate cases falling within jurisdiction of ICC under Article 17 of the Rome Statute. It is considered that Asia's legal culture prevents its states from ratifying the Statute.<sup>56</sup> On one hand, principle of complementarity has increased the number of African states signing the Statute as it reduces the nation's burden to conduct investigation for the domestic crimes; on the other hand, Asian nations are skeptical to join the ICC due to the court's intervention in domestic issues.

Second, the Chinese government questions the 'war crimes' definition provided in the Rome Statute, as it is not in consonance with the definition given in

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51 CHESTERMAN, Simon. *International Criminal Law with Asian Characteristics?* [online]. Available at: <<https://law1.nus.edu.sg/pdfs/cals/wps/CALS-WPS-1404.pdf>> Accessed: 24.01.2022

52 CHAKRABARTY, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton University Press, 2008, pp. 27.

53 ANGHIE, Antony. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, 2005, pp. 310–318.

54 *Ibid.*

55 KERR, Malcolm, SAID, Edward. *Orientalism*. New York: Pantheon Books, 1978, pp. 368.

56 FINDLAY, Mark. *supra* note 5.

customary international law and Additional Protocol 2 to the Geneva Conventions. Further, the Chinese Government finds it problematic to include commission of war crimes committed under internal armed conflict within the ICC's jurisdiction.

Third, the definition of "crimes against humanity" in the Rome Statute provides that it is not required for the state to be "at war" when such crimes are committed but from the viewpoint of China, it is required as per the customary international law. In addition, the actions prohibited under "crimes against humanity" reflect only the interest of international human rights law rather than international humanitarian law.

Fourth, incorporation of crime of aggression within the ICC's jurisdiction is another concern for the government of China as the power of the UN Security Council can be invoked through that.

Fifth, Article 15 of the Rome Statute gives Prosecutor the power to choose a situation on its own instead of referral from the State Party or the Security Council. China argues that it leaves a wide scope for political discrimination by the Prosecutor putting the transparency and independence of the organization to question.

The treaties signed between China and the colonizers, the Treaty of Nanking (1842)<sup>57</sup> and The Treaty of Tientsin (1858),<sup>58</sup> were unequal treaties<sup>59</sup> which strengthened China's nationalist sentiment and reluctance towards public international law during 20th century.<sup>60</sup> The nation did recognize the presence of international law, however, asserted the need to be in consonance with its socialistic perception.<sup>61</sup> China is hopeful about international law based on principle of equity and justice but without any western dominion or humiliation of any nation.<sup>62</sup>

China was an active participant in the ICC process but voted against the Rome Statute as it violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties.<sup>63</sup> Further, the ICC has the power to bind even non-state parties without their consent. Thereupon, China has been passively involved with the ICC. However, the UN Security Council referral of Libya situ-

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57 Treaty of Nanking [Nanjing], Britain-China, done at Nanjing, 29 August 1842.

58 Treaty of Tientsin [Tianjin], Britain-China, done at Tianjin, 26 June 1858.

59 WANG, Dong. *China's Unequal Treaties: Narrating National History*. Lexington Books, 2005, pp. 1.

60 *Ibid.*

61 SCHREITER, Larry. China's Use of International Law in Border Disputes: The Cases of India and the Soviet Union. *IUSTITIA*, 1974, vol. 2, no. 2, pp. 31.

62 XINHUA, *Full Text of Chinese FM's Signed Article on Int'l Rule of Law*. [online]. Available at: <<http://za.china-embassy.org/eng/zgxw/t1203793.htm>> Accessed:24.01.2022

63 XUE, Ru. *China's Policy Towards the ICC Seen Through the Lens of the UN Security Council*. [online]. Available at: <<https://www.toaep.org/pbs-pdf/27-xue>> Accessed: 24.01.2022

ation to the ICC in 2011 was supported by China, but both China and Russia vetoed such a referral on Syria in 2014.<sup>64</sup>

### 3.2 India

India abstained from voting during adoption of the Rome Statute.<sup>65</sup> The country's 'non-position' towards the ICC suggests longstanding state of confusion instead of a principled standpoint.<sup>66</sup> India's resistance towards ratifying the Rome Statute can be explained based on following grounds: First, the ICC's jurisdiction over war crimes in internal conflicts is certainly not favourable to India due to the state of turmoil in Jammu & Kashmir and the North-East. Indian leaders were opposed to any possibility of Indians being prosecuted for performing their duties while combating insurgency or terrorism.<sup>67</sup> Second, the ICC's capacity to determine whether the actions of a State are in consonance with justice contravenes the basic principle of State sovereignty, and can be detrimental to India's interests.<sup>68</sup> The third and the most controversial reason is the referral power given under Article 13(b) of the Rome Statute, where the United Nations Security Council acting under Chapter VII of the Charter of the United Nations can refer the crimes to the Prosecutor. The jurisdiction of the ICC as a result of referral is considered universal and even binds non-state parties, which is undoubtedly inconsistent with the principle of State sovereignty.<sup>69</sup> It further violates the fundamental principle of the Vienna Convention on the Law of Treaties that a state cannot be coerced to follow a treaty unless it willfully accepts it.

India believed that the ICC breaches the States' judicial sovereignty. The Permanent Court of International Justice observed that the state sovereignty and jurisdiction are exclusive but must be viewed within the limits of common principles of international law.<sup>70</sup> Further, India supported the position of the Non-

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- 64 MENON, Kiran. *Asia and the ICC: 20 Years Later*. [online]. Available at: <<https://thediplomat.com/2018/10/asia-and-the-icc-20-years-later/>> Accessed:24.01.2022
- 65 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, UN Doc. A/CONF.183/13/SR.2-SR.8, 1998, at 64–121.
- 66 BANERJEE, Rishav. Rome Statute and India: An Analysis of India's Attitude towards the International Criminal Court. *Journal of East Asia and International Law*, 2011, vol. 4, pp. 459; KOSHY, Ninan. International Criminal Court and India. *Economic and Political Weekly*, 2004, vol. 39, pp. 1456–1458..
- 67 LAHIRI, Dilip. *Should India Continue to Stay out of ICC?* [online]. Available at: <<https://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/>> Accessed: 24.01.2022
- 68 BANERJEE, Rishav. *supra* note 66; MAYERFELD, Jamie. The Democratic Legacy of the International Criminal Court. *The Fletcher Forum of World Affairs*, 2004, vol. 28, pp. 147.
- 69 BANERJEE, Rishav. *supra* note 66; HEYDER, Corrina. The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status. *Berkeley Journal of International Law*, 2006, vol. 24, pp. 651.
- 70 BANERJEE, Rishav. *supra* note 66

Aligned Movement (“NAM”) during the Rome Conference that State sovereignty, non-interference in domestic matters, principle of complementarity and optional exercise of jurisdiction instead of compulsory jurisdiction should be the foundational principles of the ICC.<sup>71</sup>

India has throughout supported the idea of the ICC and actively took part during the negotiations.<sup>72</sup> An Indian representative was the member of the ILC Working Group on a Draft Statute for an ICC which met 27 times and a draft was produced along with commentaries.<sup>73</sup> The details of India’s vision emerges from its engagement in the Sixth Committee that the ICC should recognize important criminal justice principles commonly followed by nations. It includes equal law for every citizen, fair trial and due process, presumption of innocence, process of appeal and review, procedure to grant parole, pardon or commuted sentences among others.<sup>74</sup> During discussions, India urged that terrorism should be included as a crime in the Rome Statute. While the discussions focussed on the core crimes, the Indian representative, Sankuratripat Ramo Rao highlighted an interest in discussing “treaty-based crimes”. However, many countries took the position that definition in the Genocide Convention should form the basis for crime of genocide.<sup>75</sup> Criminal responsibility for committing war crimes at the time of non-international armed conflict was included in the Rome Statute which received vehement opposition from India. Further, India was not happy with exclusion of usage of nuclear weapons from the purview of crime.<sup>76</sup>

### 3.3 Southeast Asia

The Rome Statute remains non-ratified by many Southeast Asian nations for various reasons including the possibility of politically motivated prosecutions, requirement to amend domestic legislations that are at variance with the Rome Statute, prior to accepting ICC’s jurisdiction – which includes constitutional immunity provided to monarchs and other heads, prioritization of national development and growth, desire for more time to assess the Statute before formalizing commitment, threat of withdrawal of military assistance by USA, or lack of government interest, further strengthened by specific domestic groups in power.<sup>77</sup> States have been facing opposition from certain segments of the govern-

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71 BANERJEE, Rishav. *supra* note 66; RAMANATHAN, Usha. India and the ICC. *Journal of International Criminal Justice*, 2005, vol. 3, pp. 627.

72 BANERJEE, Rishav. *supra* note 66

73 *Report of the International Law Commission on the Work of its 46th Session*, UN Doc. A/CN.4/464/Add.1, 22 February 1995.

74 *Statement by India, Sixth Committee of the General Assembly, Agenda Item 164: Establishment of the International Criminal Court*, UN Doc. A/C.6/50/SR.30, 13 November 1995.

75 *supra* note 25.

76 RAMANATHAN, Usha. *supra* note 71.

77 FINDLAY, Mark. *supra* note 5.

ment too. They are not in favour of the ICC as it might compromise with execution of national policies and state security.<sup>78</sup>

Most of the states of the region primarily manifested their support towards the principle of state sovereignty and non-interference in the domestic events because of their colonial history. States were sceptical and opposed the ICC's jurisdiction without the consent of the affected state. This resentment was noticeable during the negotiation process, where the states supported the formation of the ICC but national sovereignty was the priority.<sup>79</sup> The representative from Philippines stated that the national judiciary should have primary responsibility for the trial and punishment of the criminals.<sup>80</sup> Indonesia further emphasized that the principle of national sovereignty must be upheld.<sup>81</sup> Vietnam also stressed on the principle of "*primacy of national jurisdiction*" and state sovereignty.<sup>82</sup> Malaysia focussed on national sovereignty and the principle of complementarity suggesting that the ICC should complement and not replace the national courts.<sup>83</sup> Thus, the Southeast Asian nations do hold various concerns that are essential to be considered while endorsing the Rome Statute across the region. Such inadequate interest towards the ICC is seen not only in ASEAN but other Asian nations as well, including Western nations such as USA show the same tendencies.<sup>84</sup>

In the case of the ICC, the backing shown by Southeast Asian states in the initial phase seemed encouraging. Cambodia, Philippines and Thailand had signed the original treaty, which alludes to a propitious disposition towards the ICC.<sup>85</sup> Thailand has signed but not ratified. Philippines has withdrawn.<sup>86</sup> Indonesia, Laos and Malaysia were among the nations who did not sign the Statute, but they consistently participated in the ICC meetings and sessions of the Pre-

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78 PALMER, Emma. *International Criminal Justice and Southeast Asia: Approaches To Ending Impunity for Mass Atrocities*. [online]. Available at: <<https://www.eastwestcenter.org/publications/international-criminal-justice-and-southeast-asia-approaches-ending-impunity-mass>> accessed 24.01.2022

79 *Ibid.*

80 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. [online]. Available at: <<https://legal.un.org/icc/rome/proceedings/contents.htm>> Accessed: 24.01.2022

81 BERGSMO, Morten. *Historical Origins of International Criminal Law: Volume 4*. Torkel Opsahl Academic, 2015, pp. 735.

82 Statement by Nguyen Ba Son, delegation of Vietnam, at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 18 June 1998.

83 Statement by Ramanathan Vengadesan, Malaysia Ambassador to Italy, at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 18 June 1998.

84 PALMER, Emma. *supra* note 78.

85 TOON, Valeriane. *supra* note 4.

86 *ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law*. [online]. Available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>> Accessed: 24.01.2022

paratory Committee, clearly indicating their enthusiasm towards the initiative.<sup>87</sup> Philippines and Cambodia were the two ASEAN states to ratify the Rome Statute. Malaysia had signed accession instrument in 2019 but later withdrew from the Rome Statute.<sup>88</sup> The reason for the low accession rate is that the principle of non-intervention is the basis of ASEAN's international relations<sup>89</sup>, which is undermined due to powers of the ICC to start an investigation.<sup>90</sup> Philippines's act of withdrawing from the Rome Statute was even supported by China.<sup>91</sup>

Philippines is said to be one of the "architects" of the United Nations and the human and civil rights system.<sup>92</sup> Though Philippines did not ratify the Statute at an early stage, it was the first ASEAN nation to have ratified it. Senior officials of the country were not in favour of the ICC as they saw more restrictions than advantages for the law enforcers. It was believed that supporting the Roman Statute would open floodgates for false accusations and more problems.<sup>93</sup> Politically motivated accusations were a reason for the late ratification and also the reason for its subsequent withdrawal from the Rome Statute. The Philippines Government stated that their withdrawal from the ICC is a stand against politicisation of human rights. Another factor could also be the 77-page complaint the ICC received accusing President Duterte of extrajudicial killings and other blatant violations of human rights.<sup>94</sup> While Philippines' close relations with China as well as the US questions the likelihood of successful completion of investigations of the ICC,<sup>95</sup> the ASEAN nations might also support Duterte's decisions and back him up as the nations believe that the principle of non-intervention in domestic matters is the foundation to establish international relations.<sup>96</sup>

Singapore played a crucial role in reducing the Security Council's control over ICC prosecutions. As per the original provision, no prosecution that is dealt by Security Council, could commence unless otherwise decided by the Security

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87 TOON, Valeriane. *supra* note 4.

88 *Malaysia Withdraws from the Rome Statute of the International Criminal Court*. [online]. Available at: <<https://www.straitstimes.com/asia/se-asia/malaysia-withdraws-from-the-rome-statute>> Accessed: 24.01.2022

89 MAHASETH, Harsh. *The Philippines' Move Away from the International Criminal Court over the War on Drugs: A Blow for Human Rights in Asia*. [online]. Available at: <<https://voelkerrechtsblog.org/the-philippines-move-away-from-the-international-criminal-court-over-the-war-on-drugs-a-blow-for-human-rights-in-asia/>> Accessed: 24.01.2022

90 *Ibid*.

91 CNN. *China Supports PH Withdrawal from ICC*. [online] Available at: <<https://cnnphilippines.com/news/2018/03/30/china-ph-icc.html>> Accessed: 24.01.2022

92 MAHASETH, Harsh. *supra* note 89.

93 Valeriane Toon, (n. 4) 227.

94 *Court Complaint Accuses Duterte of Mass Murder*. [online] Available at: <<https://www.nytimes.com/interactive/2017/04/24/world/asia/duterte-icc-complaint.html>> Accessed: 24.01.2022

95 MAHASETH, Harsh. *supra* note 89.

96 MAHASETH, Harsh. *supra* note 89.

Council.<sup>97</sup> It gave a de-facto power to the permanent members of the Security Council through which any of them could veto the council's resolution allowing prosecution. Singapore suggested that an affirmative vote should be required by each of the permanent members along with the four non-permanent members in order to block an investigation. This difficult hurdle received support from considerable number of states including three permanent members, China, the Russian Federation and the United Kingdom.<sup>98</sup> Following more discussions, the nations reached an agreement commonly referred as "the Singapore compromise", through which prosecution could be delayed by the Security Council for 12 months. It later became Article 16 of the Rome Statute. The Rome Statute has not yet been ratified by Singapore in spite of its active engagement in one of the core issues.<sup>99</sup>

Several Southeast Asian states have developed laws and institutions for prosecuting international crimes. They have demonstrated support towards international accountability norms but continue to face socio-political issues related to financial support, human resources and technical requirements, government intervention, and apprehensions of procedural fairness.<sup>100</sup> These issues further fostered the religious perception that justice at international level is politically discriminatory and includes interference.

Domestic laws were amended by some states to charge international crimes at the state level. For example, Indonesia enacted a law<sup>101</sup> before the ICC came into force to take action against genocide and crimes against humanity. However, it could not succeed due to lack of accountability and ultimate acquittal of all the accused.<sup>102</sup> Philippines also enacted a law<sup>103</sup> in 2009 before ratifying the Rome Statute and the provisions of the Rome Statute were included in the domestic law. Vietnam as well has the legal capability to take action against international crimes<sup>104</sup> and genocide is included in Singapore's Penal Code.<sup>105</sup> The events stipulate that states in the region have followed the fundamental norms of interna-

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97 HALL, Christopher. *supra* note 28.

98 BENEDETTI, Fanny. *supra* note 27.

99 MENON, Kiran. *supra* note 64.

100 COHEN, David. *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta*. [online]. Available at: <<https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Rights-Court-2003-English.pdf>> Accessed: 24.01.2022; SPERFELDT, C. From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia. *Journal of International Criminal Justice*, 2013, vol. 11, pp. 1137.

101 Law No. 26 of 2000 of the Human Rights Court (Law 26/2000)

102 COHEN, David. *supra* note 10.

103 The Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (RA 9851)

104 Art. 341–343, Socialist Republic of Vietnam, Penal Code, No. 15/1999/ QH10.

105 Chapter VIB, Penal Code, Singapore, Chapter 224, 16 September 1872, revised 30 November 2008.

tional justice and still do it. Hence, there exists an opportunity to institute legal proceedings for international crimes even within Southeast Asia.

While circumstances may vary from country to country, region to region, the key challenge posed by the Rome Statute to traditional rules like national sovereignty, impunity to diplomats, non-extradition is not unique to Asia. Yet even regions like Africa and Latin America boast more ratification. Another observation made is that numerous other regional groupings had come up with at least a “common position” or had an “integrated policy” on the ICC, but not Asia.

While several governmental and non-governmental actors strive to increase understanding of the Rome Statute and encourage Southeast Asian nations to ratify it, taking into consideration the longstanding emphasis on sovereignty and non-interference, promotion of ratification may not be the most effective approach. Instead a more strategic approach could be by drawing upon circumstances at regional level and promoting primary principles of the Rome Statute. Several nations have taken up alternative methods to pursue accountability. By learning from those existing methods and regional experiences, an environment compliant with principles of the Rome Statute could be created in the region. The method can be pertinent for policy activists who strive to further develop international criminal law and other similar structures and organizations across Southeast Asia.

### 3.4 Glimpses Of Other Asian Nations

The two Asian nations, South Korea and Japan have shown continuous involvement towards the ICC since the beginning of the negotiation process. The two have extensively supported the ICC both financially as well as operationally.<sup>106</sup> Though Russia voted against the Rome Statute, it has actively participated in the ICC negotiations including at the recent Review Conference and has been the observer in meetings of the ICC State Parties.<sup>107</sup>

The Rome Statute was signed in early 2000 by South Korea but was ratified two years later in 2002. The ICC has seen well-known judges from South Korea, two of them being Song Sang-Hyun and O-Gwon Kwon, who have held leading positions such as of the ICC President and President of Assembly of State Parties respectively.<sup>108</sup>

The Rome Statute was ratified by Japan in 2007. Japan gave remarkable financial support to the ICC and was one of the major supporters. It further enacted domestic laws to criminalize certain international crimes to ensure harmony

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106 DUKALSKIIS, Alexander. Northeast Asia And The International Criminal Court: Measuring Normative Disposition. *Journal of East Asian Studies*, 2017, vol. 17, pp. 34–36.

107 LAHIRI, Dilip. *supra* note 67.

108 MENON, Kiran. *supra* note 64.



between the Rome Statute and law of Japan.<sup>109</sup> Japan has been an active participant and member of the Court, with representation among the ICC judges as well.<sup>110</sup> While the Statute was ratified by most of the states by 2003, Japan accepted it quite late by 2007.<sup>111</sup> There were legal as well as political reasons behind the delay in ratification by Japan. The legal reasons included ensuring conformity between Criminal Code of Japan and crimes within ICC jurisdiction,<sup>112</sup> harmonizing Article 9 of the Japanese Constitution<sup>113</sup> and the ICC jurisdiction, and<sup>114</sup> cooperation with ICC.<sup>115</sup> Largely, Japan's ratification was delayed due to harmonization of the Rome Statute with the domestic laws in addition to the working of the ICC Cooperation Law.<sup>116</sup> However, a political reason to consider was the stance of USA on the ICC. The regime of Bill Clinton was indifferent towards the ICC but during the government of George Bush, USA blatantly criticized the organization both during bilateral as well as multilateral meetings. The Japan's decision to delay the ratification was largely as a consequence of US's standpoint against ICC considering their cordial international relations. Subsequently, in 2005, US minimised its resistance against the ICC after the referral of conflict in Darfur to the ICC by the UN Security Council. In a short time following that, Japan had already began giving thought to the ratification of the Rome Statute.<sup>117</sup>

While a nation such as Japan, which was well off and already on its way towards development, had to delay its decision to ratify the Rome Statute because of the USA's stance and its campaign against the ICC, this could have also deterred a lot of other developing Asian nations from ratifying the Rome Statute.

The voices of most of the Asian nations had been non-existent during the ICC negotiation process. If such significant voices belonging to the region of diverse history are absent from the process, it's a damage to International Criminal Law which can otherwise be used to strengthen and enrich the law. Though

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109 *Ibid.*

110 GARSKÝ, Salla. *Japan's Ratification of the Rome Statute of the International Criminal Court*. [online]. Available at: <<https://www.tkfd.or.jp/en/research/detail.php?id=494>> Accessed: 24.01.2022

111 *supra* note 15.

112 ARAI, Kyo. Japan's Accession to the ICC Statute and the ICC Cooperation Law. *Japanese Yearbook of International Law*, 2008, vol. 51, pp. 365.

113 *The Constitution of Japan. 3 November, 1946*. [online]. Available at: <[http://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html)> Accessed: 24.01.2022

114 MEIERHENRICH, J. How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan. *Journal of International Criminal Justice*, 2009, vol. 7, pp. 237.

115 TAKAYAMA, Kanako. Participation in the ICC and the National Criminal Law of Japan. *Japanese Yearbook of International Law*, 2008, vol. 51, pp. 388.

116 GARSKÝ, Salla. *supra* note 110.

117 MASAKI, Yasushi. Japan's Entry to the International Criminal Court and the Legal Challenges Its Faced. *Japanese Yearbook of International Law*, 2008, vol. 51, pp. 418.

the area of law is quickly evolving, questions of universal acceptance, representation and efficacy continue to prevail.<sup>118</sup>

#### 4 Blurry Boundaries

There has been a blurring of lines between the boundary of international criminal law and the application of it in domestic tribunals.

##### 4.1 Bangladesh

To deal with the traumatic history and genocide in 1971, Bangladesh had provided for an International Criminal Tribunal in 1973 by way of a law which included war crimes, crimes against peace, genocide, and crimes against humanity.<sup>119</sup> However, this desire to deal with such matters was overshadowed by the need for the nation to get along with its powerful neighbours. The considerations of prosecutions died down after the Prime Minister, and family, were assassinated.<sup>120</sup> The Tribunal was later resurrected in 2007; however, its timing and focus has been heavily criticized because of its legal uncertainty and political nature.<sup>121</sup> There has been no involvement of the international judges in the trials conducted by the Tribunal. In addition, non-prosecution of war criminals belonging to the Pakistani military are the incidents that prove highly political nature of the Tribunal rather than ensuring justice and fair trial.<sup>122</sup>

##### 4.2 Cambodia and Timor-Leste

Cambodia and Timor-Leste sought military aid from USA, like Philippines, though on a smaller scale<sup>123</sup>. Due to several factors given below, they still ratified the Rome Statute despite the prospect of negative consequences. First, these nations drastically suffered from the crimes that form the basis of the ICC jurisdiction and ratification came as a way to disassociate themselves from these past crimes. Second, in an attempt to improve the governments' domestic and international standing that would ultimately bolster political legitimacy and credibility.<sup>124</sup>

During the period of political transition, when the UN Transitional Authority administered Cambodia and Timor-Leste, domestic laws led to establishment

118 MENON, Kiran. *supra* note 64.

119 CHESTERMAN, Simon. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford University Press, 2002, pp. 71–75.

120 LINTON, Suzannah. Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation. *Criminal Law Forum*, 2010, vol. 21, pp. 207.

121 SEN, Jhuma. The Trial of Errors in Bangladesh: The International Crimes (Tribunal) Act and the 1971 War Crimes Trial. *XIV Harvard Asia Quarterly*, 2012, pp. 33–37.

122 MOLLAH, Md Awal. War Crimes Trials in Bangladesh: Justice or Politics? *Journal of Asian and African Studies*, 2019, vol. 55, pp. 652.

123 TOON, Valeriane. *supra* note 4.

124 *Ibid.*

of human rights tribunals in the country. Groundwork in terms of training personnel and assembly of legal apparatus subsequently helped in smooth acceptance of the ICC.<sup>125</sup> In 2001, Cambodia passed the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to prosecute the criminal activities that occurred during the period of Democratic Kampuchea, with the objective of prosecuting high-level leaders who were indulged in activities that violated the criminal law as well as international law.<sup>126</sup> Similarly, Timor-Leste made a specific provision in its new constitution to punish these crimes through its courts, owing to the dreadful experience under the previous Indonesian government.<sup>127</sup>

### 4.3 Indonesia

Following the engagement of the UN with the international crimes in Timor-Leste, Indonesia saw the establishment of an Ad Hoc Human Rights Court with jurisdiction over crimes, including genocide and crimes against humanity.<sup>128</sup> However, this Court was heavily criticized for its procedural flaws, and linkage between the prosecutors and the military.<sup>129</sup> During a trial, out of the eighteen defendants who were prosecuted only two were convicted, both of whom were of Timorese ethnicity. The incident was heavily criticized by NGOs, the international community, including the USA, the EU, and even the UN,<sup>130</sup> however, Timor-Leste did not raise any opposition. Jose Ramos-Horta, the then Foreign Minister, stated, “*Almost everything for our daily needs comes from Indonesia. Therefore, if we have a bad relationship with Indonesia it will affect the living standard of the people of East Timor. The past is history now, the future is more important.*”<sup>131</sup>

### 4.4 Iraq

The Supreme Iraqi Criminal Tribunal dealt with crimes against humanity, war crimes, genocide, and certain violations of Iraqi law such as manipulating the judiciary, squandering of natural resources, and the threat or use of armed force against an Arab country.<sup>132</sup> The biggest famous/infamous incident of the Criminal Tribunal has been the conviction of the Saddam Hussein and his sentence to death. USA and political leaders of Iraq questioned the independence of

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125 *Ibid.*

126 TOON, Valeriane. *supra* note 4.

127 *Ibid.*

128 Law No. 26/2000 Establishing the Ad Hoc Human Rights Court (Indonesia: 2000), Art 7.

129 RIMMER, Susan. *Gender and Transitional Justice: The Women of East Timor*. Routledge, 2010, pp. 52.

130 *Ibid.*

131 East Timor’s foreign minister opposes rights tribunal., 8 September, 2004.

132 Coalition Provisional Authority, Statute of the Iraqi Special Tribunal, 2003, Art. 11–14.

the Tribunal and it was further criticized for retaining death penalty and lack of international judges.<sup>133</sup>

## 5 Conclusion

Asia is more heterogeneous than other regions. This makes it difficult for a unified stance. Apart from geography, there are a lot of differences between the nations. While a primary reason for the Asian reluctance could be supported by the Chinese Government endorsed cultural explanation, which has seen support from Southeast Asian nations as well,<sup>134</sup> another reason could be the view of global institutions as not being of relevance with the nations believing that it is best dealt with from 'within'.<sup>135</sup> Many Asian nations consider the area of criminal law and justice as a sovereign matter and thus falling within domestic jurisdiction are against external intervention.<sup>136</sup> Also, the role of law has not been seen as a traditional guiding principle for most of the Asian societies as it has been integral part in other parts of the world.<sup>137</sup>

The final draft of the adopted Rome Statute and the Preparatory Committee sessions do reveal that the final terms were compromised, as there were many issues and no consensus and also marred with controversy. This has shown the establishment of the ICC, which is the first permanent international criminal court in the world, as a political decision even if it does have significance in the evolution of International Criminal Law.<sup>138</sup>

Asian traditions need to be brought to bear on the ongoing conversation on alternative futures.<sup>139</sup> While it is important to excavate and document the reactions and practices of Asian nations with their underlying historical, cultural, and religious backgrounds, there is a need to keep in mind the duty of States, regardless of their political, economic, and cultural systems, to preserve and promote peace, harmony, and justice.

Asia has been contributing towards the development of the International Criminal Justice through financial contributions as well as holding seats in the

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133 BANTEKAS, Ilias. The Iraqi Special Tribunal for Crimes against Humanity. *The International and Comparative Law Quarterly*, 2005, vol. 54, pp. 237.

134 TOON, Valeriane. *supra* note 4.

135 FREELAND, Steven. *supra* note 77.

136 NOGUCHI, Motoo. Criminal Justice in Asia and Japan and the International Criminal Court. *International Criminal Law Review*, 2006, vol. 6, pp. 587–589.

137 *Ibid.*

138 Steven Freeland (n. 77) Chapter 6.

139 CHIMNI, BS. *Teaching and Research of International Law in Asia: Some Reflections on the Way Forward*. [online]. Available at: <<https://cil.nus.edu.sg/wp-content/uploads/2018/07/CHIMNI-TEACHING-AND-RESEARCH-OF-INTERNATIONAL-LAW-IN-ASIA-23-MAY-2018.pdf>> Accessed: 24.01.2022

judicial chambers.<sup>140</sup> Though there are cultural differences between them and the Western cultures, and even within their own region, the central values for International Criminal Law remain the same throughout the world. Asia should through active participation in the ICC and International Criminal Justice dialogue oppose injustices and help preserve and promote the legitimacy and universality of the ICC. Engaging with the ICC will help the Asian nations assert their normative identity and help structure their influence in the growing international criminal justice dialogue.<sup>141</sup>

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140 Assembly of States Parties, Report of the Committee on Budget and Finance on the Work of Its Twenty-Seventh Session, ICC-ASP/15/15, 28 October 2016, 36–67.

141 FINDLAY, Mark. *supra* note 5.

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- General Assembly: GA Res. 5216 (LII), fifty-second session, Official Records, Supplement 49 at 384, UN Doc A/5249 (1997). In 1995, the Preparatory Committee was established after consideration of final report of the ad hoc committee to draft a “widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference of plenipotentiaries.”
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